No. 16,322

IN THE

United States Court of Appeals

For the Ninth Circuit

S. A. PETERS and TIMBER, INC., OF CALIFORNIA,

Appellants,

vs.

KAL W. LINES, Trustee in Bankruptcy of the Estate of Snow Camp Logging Co., Bankrupt,

Appellee.

BRIEF FOR APPELLEE

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STATEMENT OF JURISDICTION

The proceedings originated by the filing of a Proof of Claim (T. 3-28) by Appellants with the Referee in Bankruptcy, to which Appellee filed his Trustee's Petition For Order Disallowing Claim Under Section 57 (d) of the Bankruptcy Act And For Judgment For Affirmative Relief, (T. 31-33), and on said petition an Order To Show Cause, (T.-34) issued, fixing a day and time certain for the hearing of the matter. The referee had jurisdiction. (11 U.S.C.A., Sec. 11a (2), Sec. 66, and Sec. 93(d).) Following the hearing, findings of fact and conclusions of law, and an order

judgment and decree were made and entered by the Referee on March 25, 1958. (T. 47-56.) Appellants petitioned for review on April 2, 1958. (T. 58-65.) The District Court had jurisdiction. (11 U.S.C.A. Sec. 67(c).) It approved and confirmed the order, judgment and decree of the Referee on October 30, 1958. (T. 71-85.) Notice of appeal therefrom to this Court was filed by Appellants on November 19, 1958. (T. 85-86.) The appeal was timely. (11 U.S.C.A. Sec. 48.) Jurisdiction of this Court to review the order of the District Court is sustained by 11 U.S.C.A. Sec. 47.

STATEMENT OF THE CASE

Appellants filed with the Referee in Bankruptcy their verified proof of claim, (T. 3-28) and sought, thereby, to participate in the distribution of any assets to creditors of the estate of Snow Camp Logging Company, a copartnership. In opposition to said claim, Appellee filed a petition objecting to the allowance of the claim on the ground it was unliquidated, and unless and until liquidated it could not be allowed, and in addition, sought a judgment for affirmative relief. (T. 31-34.) Appellants objected to the jurisdiction of the Referee to hear the matter; moved to withdraw their claim, and in response to the order to show cause issued by the Referee on Appellee's petition, set up a plea in abatement urging that their claim could be liquidated in an action pending in the State Court described in the exhibits attached to the claim as filed with the Referee. (T. 35-43.) The objection to

the Referee's jurisdiction and the plea in abatement were overruled. Hearings were had before the Referee. (T. 88-546.) The matter was thereafter submitted, and the Referee gave his Notice of Decision, and directed the preparation of findings of fact and conclusions, of law which were lodged with the Referee and thereafter signed and entered together with an Order, Judgment and Decree in favor of Appellee and against Appellants. (T. 44-56.) A petition for review was timely filed. (58-65.) The matter was argued before the District Court on the Referee's certificate and report and submitted on memoranda. Thereafter the District Court approved the certificate and report, and made and entered a Memorandum and Order reaffirming and approving the Referee's order. (T. 71-85.) The appeal to this Court was timely taken. (T. 85-86.)

The issue of jurisdiction of the Referee to hear and determine the matter is of paramount importance. The authorities hereinafter set forth amply sustain such jurisdiction on the facts with which we are here concerned. The question relative to the real party in interest is amply supported by the record, the findings of the Referee and their affirmance by the District Court.

In filing their claim in the bankruptcy proceeding Appellants asserted an interest in the estate of Snow Camp Logging Company, a copartnership, and thereby sought to participate as a creditor in the distribution of the assets of said bankrupt estate. Although, upon cross-examination of Appellant S. A. Peters, the record discloses, Appellants had records and infor-

mation to support the items which comprised their unliquidated claim, none were produced (T. 153-157):

"* * * Q. Do you have with you or can you tell us the items that comprise the sum of $900,000?

Mr. Goodwin. I object to the question at this time. The claim speaks for itself and at this time this is an application for affirmative relief on behalf of the Bankrupt and is not concerned with the proof of our claim at this time.

The Referee. You have already proved your claim by the filing of it.

Mr. Goodwin. Yes, your Honor. I will renew the objection on the ground that the claim speaks for itself.

The Referee. That may all be. Let me see the claim. It says the consideration of its liability arising out of the breach of a certain contract.

Mr. Margolis. A copy of the contract is attached to it.

The Referee. Yes.

Mr. Margolis. It appears on its face to be unliquidated.

The Referee. That is true.

Mr. Stark. That does not mean it cannot be liquidated.

The Referee. That may be, but it might go to whether or not it is the alleged $900,000 as shown here. Can you just say that somebody violated a contract; therefore it was $900,000?

Mr. Stark. It would have been impossible for us, in the document, to have furnished a bill of particulars as relates to the $900,000 and we were not called on to do so until the attack on the proof was made just the other day, pursuant to the Trustee's Petition.

The Referee. You concede you would have to have a bill of particulars?

Mr. Stark. Of some sort, yes.

The Referee. I guess we can take it orally. The objection is overruled.

Mr. Stark. Now, what is the question, Mr. Margolis?

Mr. Margolis. May we have the question read?

(Question read by the reporter as follows:

'Do you have with you or can you tell us the items that comprise the sum of $900,000?')

The Witness. Is that the question?

The Referee. Yes.

A. No, I cannot at this time.

Q. (By Mr. Margolis). Can you give us any single item which is a portion of the $900,000?

A. No, I would not want to do that without going over our records to see what we did set up.

Q. Did you furnish your attorneys, Huber & Goodwin, with any information they used as the basis of the claim you executed and verified?

A. I probably did. There are auditors.

Q. Can you tell us whether you did?

A. I don't know whether they received it. Our auditors did.

The Referee. What is your objection to the claim, Mr. Margolis?

Mr. Margolis. It is unliquidated.

The Referee. Is that all; that it is unliquidated?

Mr. Margolis. Yes. We contend it is unliquidated. On the basis that it is unliquidated, we are entitled to go into the items that comprise the claim.

The Referee. But, there is a question whether they have a good claim here?

Mr. Margolis. That is it. I think we have made a prima facie showing. As is usual in cases of this kind, on the evidence already adduced, it is the burden now for the claimant to go forward and attempt to establish it, after which, I think, we would be entitled to put in evidence of our cross-claim.

Mr. Stark. You have made a prima facie showing of what?

Mr. Margolis. That the claim has not been established; that it is an unliquidated claim. Our objection to it is that.

Mr. Stark. We do not dispute that, but the claim is to be liquidated in the trial of the action in Humboldt County now set for the 26th of November.

Mr. Margolis. That has been ruled on already.

The Referee. As I remember, an oral objection to a claim is good enough, isn't it?

Mr. Stark. I believe so, but he simply objects on the ground that it is unliquidated.

The Referee. I know he says that, but if he said it does not comply with the Bankruptcy Act——

Mr. Stark. Section 57d, your Honor, says that a claim, in effect, can be liquidated in any reasonable manner.

The Referee. I know it says that.

Mr. Stark. And we are doing our best to liquidate it.

The Referee. But, you don't want to do it in the Bankruptcy Court.

Mr. Stark. No, sir.

The Referee. You are here; that is where you are going to stay, so far as I am concerned.

Mr. Stark. Well, the witness cannot state a bill of particulars.

The Referee. He would be entitled, I think, to file a bill of particulars.

Mr. Margolis. Very well.

The Referee. How long will it take you to prepare it?

The Witness. I would have to do it after I went back to Arcata, your Honor.

The Referee. How many days after you get back?

The Witness. I would say two or three days.

The Referee. I think that is where we are now. I think we can stop right here and give him time to prepare that. * * *"

Appellants filed a Bill of Particulars. (T. 43-44.) At the continued hearing, the record, (T. 166-167) discloses the following testimony:

"* * * Q. Now, do you have in your office the items which you told this Court were prepared by your accountants and turned over to Messrs. Huber and Goodwin for the purpose of filing this claim?

A. They are only estimates. That is all we could make.

* * *

Q. You tell us now that the $900,000 is just an estimate. Is that correct?

A. That is all we could do. That is correct.

* * *"

Although all the issues raised by the Appellee's counterclaim were vigorously contested, no evidence was introduced nor offered in support of Appellants' claim.

STATEMENT OF FACTS

Appellants set forth a mixture of facts and legal conclusions (AOB 10, 11, 12), under the heading "Statement of Facts". The statements therein contained are misleading in many instances, and an advocacy of contentions in most others. The statement does not comply with Rule 18(e) of this Court in that no adequate reference is made to pages of the record to permit verification. Accordingly, it is requested that such statement be disregarded in its entirety.

On June 1, 1951, Appellant Peters and bankrupt Snow Camp Logging Company entered into an agreement in writing. (T. 89-90.) The agreement provided that Snow Camp sell and Peters buy all logs required by Peters in his Redwood Creek sawmill operation for a period of 10 years at Arcata market price less $4.00 per thousand board feet. (T. 7-8.)

Immediately thereafter Peters built a gang mill on Redwood Creek but built no other type mill (T. 94), although the contract recited that a circular mill and a veneer mill were to be built by Peters. (T. 6.) Peters told Snow Camp he would complete the circular mill in 1953 (T. 96) and monthly log requirements would approximate 5 to 6 million feet (T. 95).

Thereupon, Snow Camp purchased 3 tractors at a cost of $31,000 each, lined roads to proceed to Peters' mill rather than to the highway, purchased 5 International trucks at a cost of $17,000 each, and 12 G.M.C. trucks at a cost of $20,000 each in order to meet Peters' requirements. (T. 97-98.)

Logs were delivered to Peters up to October 21, 1953 with never a complaint there were insufficient logs to supply his requirements. (T. 102.)

From May of 1953 to October 21, 1953, logs were allowed to pile up at the Peters Mill dump, making further unloading impossible for periods of 2 to 3 days' duration. (T. 103, Trustee's 2 and 3.) Trucks loaded and awaiting unloading could not be used until unloading was completed. (T. 107.) Operation and clearing of the log dump was the sole responsibility of Peters. (T. 109.)

The result of the tie-up of trucks was loss of use of the equipment and disruption and delays in the logging operations (T. 111), increasing logging and delivery costs. (T. 111.) Woods workers wages alone for each crew was $28.50 per hour. (T. 116-117.) The time lost by delays during May to October 21, 1953, represented 30% of the total time. (T. 120.) Of the total of 17,113 hours worked during the period, (T. 313, Trustee's 17), 30% amounts to 5,134 hours wasted @ 28.50 per hour (T. 116-117) for wages alone.

Delays of Snow Camp trucks resulting from dump plugging during the summer and fall of 1953 amounted to 30% of total time. (T. 120.) Actual "earnings" or value of production of trucks during that period were $93,561.42 (Trustee's 18), whereas average reasonable earnings for the trucks involved over that period were $198,000. (T. 320.) The difference in earnings of trucks was 30% attributable to delays at Peters' dump. (T. 321.) Peters men deliberately let the dump become plugged. (T. 213.)

During the period from the latter part of July through October 21, 1953, Peters paid less than the invoiced amounts for logs delivered (T. 171 et seq., Trustee's 6-12) in an amount totalling $19,625.91. Peters explained this shortage as being pursuant to some modification of the writing, the terms of which modification appear uncertain (AOB Appendix D, T. 129-145.) Snow Camp, through witness Vanderjack, stated there was no departure from the usual method of invoicing in effect during the entire contract and no dispute regarding the price computations therein. (T. 402-403.) Snow Camp protested the underpayments. (T. 177, Trustee's 13.)

Contrary to the contract requirement that he buy all his requirements from Snow Camp (T. 7), and in the face of demonstrated capacity of Snow Camp to supply his needs (T. 432), Peters purchased logs from others during August, September and October, 1953. (T. 210, T. 219, T. 253, (testimony of Peters own millwright) T. 294, T. 296.) On October 18, 1953 Peters informed Snow Camp that he would accept no more logs. (T. 295.) Snow Camp attempted deliveries for a few days but received no receipts for logs delivered (T. 295), and Peters never accounted for those deliveries. (T. 296.) Snow Camp demanded a receipt through its driver Virgil Ray, but was refused. (T. 295, T. 287-289.)

As a result, Snow Camp was required to dump all its production on the open market. (T. 297.) The market softened and bankruptcy ensued. (T. 297.)

The cost of delivering logs to open market was $10.31 per thousand, (T. 301), whereas cost of delivery

to Peters was $4.00 per thousand. Of the $6.31 price advantage to Snow Camp, $4.00 was allowed Peters in the Contract (T. 7) leaving remaining a contract advantage of $2.31 per thousand compared to open market.

During 1953, Snow Camp was delivering more than 2 million feet per month. (Trustee's 15.) Peters' production was averaging 3 million per month. (T. 251.) By mathematical computation the contract had 91 months yet to run at October 21, 1953. (T. 8, Sec. 7.)

After October 21, 1953, no further deliveries of logs were made to Peters by Snow Camp. (T. 294.) This litigation ensued.

ARGUMENT OF THE CASE

1. THE ORDER OF THE DISTRICT COURT WHICH APPROVED THE REFEREE'S ORDER OVERRULING THE OBJECTION TO THE JURISDICTION OF THE REFEREE TO HEAR AND DETERMINE THE MATTER, IS SUSTAINED BY NUMEROUS AUTHORITIES.

Where a creditor files a claim to which a bankruptcy trustee interposes a defense by way of a counterclaim exceeding the amount claimed by the creditor, and the counterclaim arises out of the same transaction or occurrence, the filing of the claim amounts to consent to the summary jurisdiction of the bankruptcy court.

Alexander v. Hillman, 1935, 296 U.S. 222, 56 S. Ct., 204, 209, 80 L. Ed. 192;

Pepper v. Litton, 1939, 308 U.S. 295, 60 S. Ct. 238, 244, 84 L. Ed. 281;

Columbia Foundry Co. v. Lochner, 1950 (4 Cir.) 179 F. (2d) 630, 634, (14 A.L.R. (2d) 1349-1358);
Florance v. Kresge, 1938, 4 Cir., 93 F. (2d) 784.

In *Alexander v. Hillman* (supra), the Court 56 S. Ct., stated at page 209:

> "Respondents appropriately presented their claims and became entitled to adjudication without petition for intervention, any formal pleading, or commencement of suit. Unquestionably, they submitted themselves to the court's jurisdiction in respect of all defenses that might be made by the receivers and of all objections that other claimants might interpose to the validity, amounts or priorities of their claims. * * *"

The jurisdiction to allow and disallow proofs of claim in a bankruptcy proceeding is based on Sec. 2 a(2) of the Bankruptcy Act, (11 U.S.C.A. Sec. 11 a(2)), which provides:

> "The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . . allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates."

The manner of liquidating claims is governed by Section 57d of the Bankruptcy Act, (11 U.S.C.A. Sec. 93d) which provides:

> "Claims which have been duly proved shall be allowed upon receipt by or upon presentation to the Court, unless objection to their allowance shall be made by parties in interest or unless their consideration be continued for cause by the court upon its own motion: Provided, however, That an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated in the manner and within the time directed by the Court; and such claim shall not be allowed if the Court shall determine that it is not capable of liquidation or of reasonable estimation or that such liquidation or estimation could unduly delay the administration of the estate or any proceeding under this Act."

The Supreme Court of the United States has held in several cases, that the exclusive jurisdiction of the bankruptcy court to control the administration of a bankrupt estate cannot be surrendered to another court. *United States Fidelity & Guaranty Co. v. Bray,* 1912, 225 U.S. 205, 32 S. Ct. 620, 56 L. Ed. 1055; *Gross v. Irving Trust Co.,* 1933, 289 U.S. 342, 53 S. Ct. 605, 77 L. Ed. 1243, *Isaacs v. Hobbs Tie & Timber Co.,* 1931, 282 U.S. 734, 51 S. Ct. 270, 75 L. Ed. 645.

In this respect the jurisdiction of the bankruptcy court is exclusive of all other courts. It is so held in *Pepper v. Litton,* (supra), the Court stating, 60 S. Ct. 238 at 244:

> " . . . Among the granted powers are the allowance and disallowance of claims; the collection and distribution of the estates of bankrupts and the determination of controversies in relation

thereto; the rejection in whole or in part 'according to the equities of the case' of claims previously allowed; and the entry of such judgments 'as may be necessary for the enforcement of the provisions' of the act. *In such respects the jurisdiction of the bankruptcy court is exclusive of all other courts. United States Fidelity & Guaranty Company v. Bray,* 225 U.S. 205, 217, 32 S. Ct. 620, 625, 56 L. Ed. 1055 . . .

"*Hence, this Court has held that a bankruptcy Court has full power to inquire into the validity of any claims asserted against the estate and to disallow it if it is ascertained to be without lawful existence.* Lesser v. Gray, 236 U.S. 70, 35 S. Ct. 227, 59 L. Ed. 471. And the mere fact that a claim has been reduced to judgment does not prevent such an inquiry. As the merger of a claim into a judgment does not change its nature, so far as provability is concerned, Boynton v. Ball, 121 U.S. 457, 7 S. Ct. 981, 30 L. Ed. 985, so the court may look behind the judgment to determine the essential nature of the liability for purposes of proof and allowance. Wetmore v. Markoe, 196 U.S. 68, 25 S. Ct. 172, 49 L. Ed. 390 . . ." (Emphasis added.)

In *Florance v. Kresge,* (supra), where a trustee filed counter-claims arising out of the same contract which formed the basis of the creditor's claim, it was stated at page 786:

" . . . We see no reason why the court of bankruptcy should not pass upon the claims in favor of the bankrupt estate and set them off against the claims filed against the estate and its receivers; and under the recent decision of the Supreme

> Court in Alexander v. Hillman, 296 U.S. 222, 56 S. Ct. 204, 209, 80 L. Ed. 192, we see no reason why the court, which is a court of equity even though exercising special statutory powers, should not proceed to render judgment against Kresge for any balance found to be due by him . . ."

In *In re Mercury Engineering Co.,* 1945, D.C.S.D. Cal., 60 F.S. 786, the Court in following *Alexander v. Hillman, Pepper v. Litton,* and *Florance v. Kresge,* (supra) stated at page 787:

> " . . . My own impression is, despite some older decisions by other judges of this district, in the light of the more modern trend to identify the function of the Referee in passing on claims . . . the right to award a judgment exists . . . One who comes into a court of equity and asks that it give recognition to a claim, so that he may share in an estate before it in the proportion which his claim bears to the value of the estate, has brought before the court the determination of his entire claim. And if the Court finds that his claim is invalid, he is not in a position to say that the Court, the jurisdiction of which he invoked has no power to render judgment against him for the surplus . . . "

The foregoing holding was followed in *In re Germain,* 1956, D.C.S.D. Cal. 144 F.S. 678.

In *Inter-State National Bank of Kansas City v. Luther,* 1955, 10 Cir., 221 F. (2d) 382, where appellant bank filed a creditor's proof of claim to which the bankruptcy trustee filed objections and sought affirmative relief on a voidable preference, the bank

objected to the jurisdiction of the bankruptcy court on the grounds, (a) that the bankruptcy court could not in a summary proceeding hear and determine the matter because it made timely objection to such jurisdiction as provided in Section 2a(7) of the Bankruptcy Act, 11 U.S.C.A. Sec. 11, sub. a(7), and (b) that the claim it filed arose out of a transaction which differed from that of voidable preference claim asserted by the trustee. In overruling these defenses, and sustaining the District Court's affirmances of the bankruptcy court's order granting affirmative relief, the Court in following *Alexander v. Hillman* (supra), stated at page 390:

> "We hold, therefore, that the court acquired jurisdiction of the counterclaim by implied consent, and that it was authorized to adjudicate the preference and give judgment for recovery of the same."

Appellants ground their opposition to the bankruptcy court's jurisdiction, to hear and determine the issues here involved, on an erroneous premise. They say (AOB 13 and 14), that since the pending matter did not cover a "preference action" and "the sole basis of Appellee's counterclaim was not any preferential or fraudulent transfer . . .", the rule which allows counterclaims to be heard and determined by the bankruptcy court only governs such situations, and is not applicable to the instant matter. We challenge the accuracy of that statement.

Columbia Foundry Co. v. Lochner, (supra), relates to a situation in which a creditor filed a claim for a

balance, on an open book account, for iron castings furnished the bankrupt, and a counterclaim for damages, asserted by the trustee, because the imperfect castings resulted in a loss of business and the ensuing bankruptcy.

In *Florance v. Kresge* (supra), the creditor's claim was for unremitted rent collected by the bankrupt from tenants of the creditor, and the counterclaim asserted by the trustee was on a contract under which the bankrupt was entitled to a percentage of the profits arising out of a sublease procured by the bankrupt for the creditor.

The reading of the authorities cited by Appellants on this point reveals they are readily distinguishable both on the facts and the law and several because of their antiquity, for example:

In re Continental Producing Co., 1919, D.C. Cal. 261 F. 627, and *In re Bowers,* 1940, 33 F.S. 965, held that a bankruptcy court could not enter a judgment on a counterclaim for any excess, and the former also held that it was mandatory for the trustee to waive the excess before the Referee could undertake hearing the matter on the merits. *In re Florsheim,* 1938, D.C. Cal., 24 F.S. 991, is to the same effect. Obviously this is not the law today. The earlier cases were decided before the United States Supreme Court decision in *Alexander v. Hillman,* (supra) the later did not consider the rule therein announced.

Fitch v. Richardson, 1906, 1 Cir., 147 F. 197; *Metz v. Knobel,* 2 Cir., 1927, 21 F. (2d) 317; *In re Conti-*

nental Producing Co., In re Bowers, and *In re Florsheim* (supra), were considered in *Columbia Foundry Co. v. Lochner,* (supra) wherein the 4th Circuit pointed out that they were decided before the decision of the Supreme Court in *Alexander v. Hillman,* (supra), and in most of the subsequent cases no mention of that decision is made.

Harrison v. (Cumberland, sic) *Chamberlin,* 1926, 46 S. Ct. 467, 271 U.S. 191, 70 L. Ed. 897, is inapplicable. Here the trustees sought to bring in a stranger to the proceedings to recover property held adversely to the trustee, under a claim of right which was not merely colorable. There is no question but that the holding is correct. It does not, however, cover a factual situation with which we are here concerned.

Cline v. Kaplan, 1944, 65 S. Ct. 155, 323 U.S. 97, 89 L. Ed. 558, is inapplicable. A trustee by a petition for a turn over order sought to recover property from a stranger to the bankruptcy proceedings. The respondents' answer claimed ownership in themselves and prayed dismissal of the petition. After extensive hearings to determine whether the property was in the constructive possession of the bankruptcy court, respondents then moved for a dismissal for want of summary jurisdiction. The motion was granted. The rule in this case which stands for the proposition that objection to the summary jurisdiction of the bankruptcy court could be made even after trial and before submission has been abrogated by the 1952 amendment to Section 2a (7) of the Bankruptcy Act, (11 U.S.C.A. Sec. 11a(7)), which now requires a party adverse

to the trustee, to interpose objection to the summary jurisdiction of the bankruptcy court by answer or motion within the time prescribed by law or rule of court.

B. F. Avery & Sons Co. v. Davis, 1951, 5 Cir., 192 F. (2d) 255, is distinguishable on the facts and the law. There the Trustee asserted several claims which were not related to the proof of claim filed by the creditor which covered the balance of an open account. The Trustee sought the recovery of a promissory note drawn in bankrupt's favor by one of his debtors which a representative of Avery Company picked up together with a neon sign prior to the intervention of bankruptcy. Avery Company contested the summary jurisdiction of the bankruptcy court on the ground that those items of personal property were acquired before bankruptcy and were held by it under an adverse claim of right, asserted in good faith which assertion was not merely colorable. We have no quarrel with the holding in this case, because the claim of the trustee for the recovery of the personal property bore no relation to, nor did it arise out of the same transaction, as the claim on the open book account filed by the creditor. Appellants' contention that the rule announced in that case should be followed by this court, (AOB 14), is founded upon a misapplication of the facts therein and those in this pending matter. The rule that a bankruptcy court does not have jurisdiction to hear and determine, in a summary proceeding, title to property, not in its actual or constructive possession, is not involved in this case, as it was in the *Avery*

case. Accordingly, it is our contention that the rule of the Fifth Circuit is not applicable.

In re Tommie's Dine & Dance, 1952, D.C. Tex., 102 F.S. 627, is distinguishable on its facts and hence is not applicable here. On page 628, it is stated:

> " . . . The Columbia Foundry Co. v. Lochner decision grew out of the same transaction, which is not true in the case at bar . . ."

In re Houston Seed Co., 1954, D.C. Ala., 122 F.S. 340, appears to follow the long discarded rule announced in *In re Continental Producing Co.,* and *In re Bowers,* (supra) at page 343 the Court stated:

> "The referee did not err in disallowing the trustee's counterclaims for any sums beyond the amounts set out in the proofs of claims . . ."

This rule would require a trustee to split his claims. It is not followed by the District Courts in this Circuit. See *In re Nathan,* 1951, D.C. Cal., 98 F.S. 686, 26 So. Cal. L. Rev. 167, which is approved in *Danning v. United States,* 1958, 9 Cir., 259 F. (2d) 305.

Duda v. Sterling Mfg. Co., 1949, 8 Cir., 178 F. (2d) 428, is likewise distinguishable on its facts. The trustee in a reorganization proceeding, by a petition alleging several causes of action and an order to show cause issued thereon sought to bring Duda into the bankruptcy court, in order to recover on his alleged claims. Duda objected to the summary jurisdiction at once, and filed an answer claiming certain setoffs. *The important distinction is that he did not file a creditor's claim in the first instance.*

2. THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE REFEREE'S ORDER HOLDING THAT COMITY DID NOT EXIST UNDER THE FACTS AND CIRCUMSTANCES OF THIS MATTER, AND THAT JURISDICTION OF THE BANKRUPTCY COURT WAS SUPERIOR TO THAT OF THE STATE COURT.

Even in a non-bankruptcy matter where the question of comity was raised "that there is pending an action in the superior court of Los Angeles County, California, this Court in *Hudson v. McWilliams,* 1927, 9 Cir., 17 F. (2d) 733, stated at page 734:

> "The prior suit, the pendency of which is relied upon as divesting jurisdiction in the present case, is pending on appeal to the Supreme Court of California . . . But the pendency of that suit was clearly no obstacle to the jurisdiction of the court below to maintain the present suit, and to protect in the meantime the alleged interests of appellees."

Furthermore, the Courts of California, in considering this same question in a bankruptcy matter, have agreed that it is proper for the Federal Courts, under the Bankruptcy Act, to proceed with the administration of the affairs, property and claims involving the bankrupt, to the exclusion of the State Court even though the initiation of a State Court action preceded the intervention of bankruptcy. *Manter v. Howard,* 1949, 94 C.A. (2d) 404.

It is true that in certain matters which may arise in the administration of a bankruptcy estate, even such as the instant case, the bankruptcy court *might in the exercise of its discretion,* conclude that it is desirable to have a state court try a certain issue when it

feels that the state court is in a better position to determine the same expeditiously. Here the referee denied Appellants' opposition to his jurisdiction to hear and determine the matter. The question presented then, is that in so doing, did the referee sitting as the bankruptcy court, abuse his discretionary powers? We think not.

This Court in *Heider v. McAllister,* 1958, 9 Cir., 265 F. (2d) 486, affirmed an order of the District Court which had affirmed a bankruptcy referee's order denying a motion to dismiss the trustee's objections to a claim "on the ground that the Bankruptcy Court is without jurisdiction to entertain these objections because the same matter has been submitted to the" state court. The Court followed the holding in *Pepper v. Litton,* (supra), and stated at page 488:

> "The motion was denied on the ground that the Bankruptcy Court could not relinquish paramount jurisdiction to determine the validity and amount of a claim to property in the possession of that court. It was also held that the 'action in the state court is for the recovery of corporate funds and only indirectly involves the question of the validity of the Heider mortgage.' Upon a hearing on the merits, the claim of Heider was held without validity. The District Court affirmed upon review. Appeal to this Court followed.
>
> "The Bankruptcy Court has plenary and paramount authority to determine the validity of asserted liens upon property of the bankrupt in its possession at the date of the filing of the petition for adjudication. Here the question of validity of the Heider claim of lien was expressly reserved

at the time of the creation of the fund still in the possession of the Bankruptcy Court. The Referee has held the alleged lien invalid. No question is raised upon the merits. Under the circumstances, this Court holds the Bankruptcy Court was in exercise of jurisdiction committed to that tribunal."

"It is argued that the Referee could not act without first expressly cancelling and withdrawing the permission to maintain suit in the state court. In the face of the express reservation, the question as to the validity of the alleged lien was never submitted to the state court. Heider attempted to bring this cause of suit into that proceeding by counterclaim and was met by plea in abatement. The Referee held that the issues submitted to the state court involved the Heider mortgage only indirectly. Unquestionably, if there had been a decision upon these issues, the Heider claim in bankruptcy might have been affected. However, that is of no consequence since the state court has never decided any question upon the merits.

"No discussion is necessary of the problem which would have been presented if the state court had actually entered a judgment in which it determined facts affecting the Heider Claim. Questions of *res judicata* or collateral estoppel by judgment might be raised. The effect of the consent of the Referee to adjudication might, under such circumstances, be of weight. There has been no adjudication by the state court."

"Another matter is debated. It is contended that, if the Referee has once consented to suit by a trustee in the state court, the mandate is irrev-

> ocable. This Court is of the opinion that such an action could be dismissed without prejudice upon order of the Referee or that the Referee might withdraw consent to further maintenance of the action at any time before trial . . ."

In seriously urging the defense of comity, Appellants have conceded that the real parties in interest in the state court action, and the controversy, are the same as in the proceeding herein—a position inconsistent with the Appellants' contention that the bankrupt is not the real party in interest in this proceeding.

The question of comity between a state court and a bankruptcy court was ruled upon in *Englebrecht v. Wildman,* 9 Cir., No. 16182, ...F. (2d) ..... In this case an action, to dissovle a partnership and for an accounting, was brought in a state court, and while it was pending, one of the partners, and his wife, filed their voluntary petitions in bankruptcy. The appellants before this Court objected to the jurisdiction of the bankruptcy court to hear and determine the matters relating to items of property which were the subject matter of the state court action and which belonged to a predecessor partnership, in which the bankrupt was a member. On the basis of these facts, this Court after questioning the assertion by appellant that this was an in rem action, and assuming it to be such, stated:

> "The state court action, to the extent it may have attempted to deal in rem with the property, abated upon the filing of the petition."

It is apparent, therefore, that the Federal Courts, applying the provisions of the Bankruptcy Act, have authority to hear and determine matters affecting a bankrupt's property and liabilities, whether the issues to be determined are in rem or in personam notwithstanding a prior state court action. This contention is supported in *Toucey v. New York Life Insurance Company,* 1941, 314 U.S. 118, 86 L. Ed. 100, 62 S. Ct. 139, where the United State Supreme Court points out, at page 143, that in Bankruptcy proceedings, comity does not prevail.

Appellants argue they were deprived of a jury trial. (AOB 16.) They fail to point out to this Court that they vigorously and successfully resisted having the cause heard before a jury in the State Court. Appellants would leave the impression that a definite date for trial in the State Court was set, for a day certain, preceding the hearing on the order to show cause herein, but fail to reveal that such date had been vacated prior to the hearing of the order to show cause herein, because of the Judge's serious illness, hospitalization and subsequent death. This is reflected by the record. (T. 538-540.)

> "Mr. Hilger. By way of a statement to the Court, in as much as the record, or a portion thereof, at least, of the action in the State court has been introduced by the Claimant, I would like to complete that matter by observing to the Court that the Claimant in the matter, or in this matter, and the Defendant in the State court action, moved the State Court to have the matter tried without a jury, after the matter was set as a jury

case in October, and upon such motion the State Court set the matter as a non-jury case, and that was upon the motion of the Defendant there, the Claimant here.

Isn't that correct, Mr. Goodwin?

Mr. Goodwin. It was originally set as a jury trial at your request, and after a jury had been waived and we objected to the jury——

Mr. Hilger. That is correct, you objected to a jury, and the result of that objection was that it was changed to a non-jury setting.

Mr. Goodwin. That is my recollection.

Mr. Hilger. And the judge before whom this matter was (454) set was unable to try the same because he was taken to the hospital for surgery. And then it was re-set for a later trial, at which time the Trustee filed his objection and initiated this proceeding. The judge before whom this matter was set since died.

Mr. Stark. It is true, however, that the trial in the State court was set for trial on a date certain, which preceded the date this hearing came on for hearing.

Mr. Hilger. It had at one time been so set, but was unable to be tried because of the fact that the judge went to the hospital on that date.

Mr. Goodwin. That is true. And on one occasion it was reset for another date, and we were restrained, as I remember, from proceeding with the action.

Mr. Hilger. That is correct. But the second setting was subsequent to the initiation of this proceeding; the first setting was prior, the second setting was subsequent.

Mr. Goodwin. I think it was set the second time prior to this. I am sure it was.

Mr. Stark. What happened was this ——

Mr. Hilger. It was set, but the time set would have occurred subsequent to the initiation of this proceeding.

Mr. Stark. That is right. Here is what happened: You started the hearing on your objections and sought a continuance. That would have carried you by the date the matter was set for the State court. (455)

Mr. Hilger. We did not seek a continuance. The continuance was granted on the Court's own motion.

Mr. Stark. Let's not quibble about words. The continuance occurred. At the time the continuance was indicated you asked the Court to restrain the parties in the State court action.

Mr. Hilger. That is correct.

Mr. Goodwin. That is correct."

Under the circumstances of this matter, appellants' contention that they were entitled to a jury trial is without merit. In a similar factual situation, where, upon the filing of a proof of claim, a trustee sought affirmative relief on a counterclaim for the recovery of a voidable preference, and the question of the right of the creditor to a jury trial, the Court in *Inter-State National Bank of Kansas City v. Luther* (supra), stated at page 390:

> "To the contention that the Bank was denied the right to a jury trial, it need only be said that if, as we have held, the Bank impliedly consented to the summary jurisdiction of the court, it thereby pro tanto waived its right to a jury trial on the issues involved in the claim and counterclaim, including the preference issue."

The authorities urged by Appellants on this point are distinguishable as hereinafter set forth.

In *Murphy v. Bankers Commercial Corp.,* 1953, 2 Cir., 203 F. (2d) 645, a direct appeal was taken to the Circuit Court from an order made by the District Court, in a plenary action to foreclose a mortgage, denying an injunction pendente lite to stay a similar pending action in a foreign country. This case merely holds that the District Court did not abuse its discretion in denying the injunction. In *Brehme v. Watson,* 1933, 9 Cir., 67 F. (2d) 359, a review to the District Court was taken from a restraining order issued by the bankruptcy court, upon application of a petitioning creditor in an involuntary proceeding, which attempted to restrain the alleged bankrupt from proceeding with the defense of two actions brought by that creditor, and in which action that creditor caused attachments to be levied. This Court in reversing the bankruptcy court, and dissolving the restraining order held (page 362) that:

> "Appellee's effort through the medium of suits brought by him, to precipitate appellant into bankruptcy and thereafter by restraining order prevent him from presenting his defenses to these suits was an unfair and oppressive use of legal process which should not be permitted. 32 C.J. p. 86."

The rule announced by the foregoing authorities is that such an injunction, issued by a bankruptcy court, may be directly appealed. No review was taken by Appellants in the instant matter within the time required by law, and was raised for the first time when

the entire matter was brought up to the District Court. Those authorities, therefore, appear to be inapplicable.

Prefacing the colloquy, AOB 18, which led up to the granting of the restraining order, the Referee had theretofore informed Appellants that the issues would be tried before the bankruptcy court. (T. 156-157.)

> "Mr. Stark. Section 57 your Honor, says that a claim, in effect, can be liquidated in any reasonable manner.
>
> The Referee. I know it says that.
>
> Mr. Stark. And we are doing our best to liquidate it.
>
> The Referee. But, you don't want to do it in the Bankruptcy Court.
>
> Mr. Stark. No sir.
>
> The Referee. You are here and that is where you are going to stay, so far as I am concerned. . . ."

The foregoing colloquy, added to the portion quoted, AOB 18-19, amply demonstrates that the granting of the restraining order was not made ex parte. True, it was not made on notice, but the trial was already in progress. (T. 88-161.) The order was directly appealable and no appeal having been taken, it was final and conclusive upon Appellants.

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3. THE UNITED STATES DISTRICT COURT DID NOT ERR IN AFFIRMING THE REFEREE'S RULING, REFUSING TO PERMIT THE WITHDRAWAL OF APPELLANTS' CLAIM.

This precise question of the withdrawal of a claim filed in a bankruptcy proceeding and against which a

trustee filed a counterclaim for the recovery of a voidable preference, was decided in *In re Nathan,* 1951, D.C. Cal., 98 F.S. 686; 26 *So. Cal. L. Rev.* 167. In overruling the referee's order permitting the withdrawal of the claim in that case, the District Court stated at page 692:

> "In addition to the considerations of reason just discussed there are patent considerations of policy which also support extension of the rule of Alexander v. Hillman, supra, 296 U.S. 222, 56 S. Ct. 204, 80 L. Ed. 192, to bankruptcy proceedings.
>
> "The general policy of the Bankruptcy Act to effect 'quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay,' Bailey v. Glover, 1874, 21 Wall. 342, 88 U.S. 342, 346, 22 L. Ed. 636, is supplemented by the provisions of Sec. 68, sub. a, 11 U.S.C.A. Sec. 108, sub. a, which in effect declare a statutory policy to settle all permissible claims or accounts 'between the estate of a bankrupt and a creditor'. See Cumberland Glass Mfg. Co. v. De Witt, 1915, 237 U.S. 447, 454-457, 35 S. Ct. 636, 59 L. Ed. 1042."
>
> "The provisions of Rule 41 of the Federal Rules of Civil Procedure, applicable in bankruptcy, clearly further such a policy. See Kelso v. Maclaren, supra, 122 F. (2d) at page 870; cf. Kleid v. Ruthbell Coal Co., supra, 131 F. (2d) at page 373.
>
> * * *
>
> "As Mr. Justice Douglas put it in Case v. Los Angeles Lumber Products Co., 1939, 308 U.S.

106, 126-127, 60 S. Ct., 1, 12, 84 L. Ed. 110: 'And once the jurisdiction of the court has been invoked, whether by the debtor or by a creditor, that petitioner cannot withdraw and oust the court of jurisdiction. He invokes that jurisdiction risking all of the disadvantages; which may flow to him as a consequence, as well as gaining all of the benefits.' "

The holding in the Nathan case (supra) was followed in *In re Germain,* 1956, (D.C. Cal.) 144 F.S. 678, where a similar problem arose, and the jurisdiction of the bankruptcy court was sustained. The District Court stated at page 682:

> "The filing of a claim in bankruptcy is a consent to the summary jurisdiction of the court to pass on its validity. The creditor 'thereby consents to the jurisdiction of the court to decide any defenses that may be lawfully interposed.' In Re Barnett, 2 Cir., 1926, 12 F. (2d) 73, 81."

To the same effect are the rulings in:

In the Matter of Petroleum Conversion Corporation, 1952, (3 Cir.), 196 F. (2d) 728;

In re Solar Manufacturing Corporation, 1952, (3 Cir.), 200 F. (2d) 327, 329;

Conway v. Union Bank of Switzerland, 1953, (2 Cir.), 204 F. (2d) 603, 606;

Interstate National Bank of Kansas City v. Luther, 1955, (10 Cir.), 221 F. (2d) 382, 388.

In the recent case, *Danning v. United States,* 1958, (9 Cir.) 259 F.(2d) 305, where a bankruptcy trustee filed a counterclaim to a claim of the United States for taxes, the summary jurisdiction of the bankruptcy

court was denied because there was no waiver of sovereign immunity, this Court, nevertheless, approved the rule in the *Nathan* case (supra), stating at page 306:

> "It is apparently conceded by both parties here that if the United States Government were not the party claimant, and a mere creditor had filed a claim against the bankrupt's estate, then the bankruptcy court would have jurisdiction to enter a summary judgment against the claimant upon a counter-claim asserted by the trustee as an objection to the claim.* * *"

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4. **THE UNITED STATES DISTRICT COURT WAS CORRECT IN SUSTAINING THE JURISDICTION OF THE REFEREE IN ENJOINING APPELLANTS FROM PROCEEDING IN THE STATE COURT.**

Appellants argue that the rule in *Brehme v. Watson,* supra, holds that a bankruptcy court does not have the authority to restrain litigants in a state court action, because in so doing the restraint is against the court. That decision interpreted Section 2a(15), (11 U.S.C.A. Sec. 11(15)) as it read in 1933. It was amended by adoption of the Chandler Act in 1938, by adding the proviso that "an injunction to restrain a court may be issued by the judge only." The entire section now reads:

> "(15) Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act: *Provided, however,* That an injunction to restrain a court may be issued by the judge only;"

The reasoning of Congress which prompted the amendment and the text interpreting its meaning is found in *Collier on Bankruptcy,* Vol. 1, p. 302:

> "In the House Report on the proposed revision of the Bankruptcy Act in 1937 it was said:
>
> 'There has also been some question about the power of referees to issue injunctions. The weight of authority seems to be that the referees may enjoin parties to a suit although they are prohibited by General Order XII clause 3, from enjoining the court itself, this power being reserved to the judge. As a matter of actual practice, of course, injunctions are not issued to restrain the court, but to restrain the parties litigating therein. These matters should be cleared up.'
>
> The 1938 Act thereupon added to former § 2a(15) the proviso that 'an injunction to restrain a court may be issued by the judge only.' The negative implication from the language alone would seem to be that in cases other than restraint of a court, the referee does have power to issue an injunction. Moreover, the revised General Order 12 only denies to the referee jurisdiction over those proceedings required by the Act or the General Orders to be had before the judge. In view of the recognition that the weight of authority favored the referee's power to grant stays, and in view of the general broadening of the referee's powers in the Act itself, it would seem strange for the legislative body not to prohibit specifically referees from exercising such power, had that been its intention. Nor is it convincing to argue that since in 'actual practice . . . injunctions are not issued to restrain a court', the pro-

viso is meaningless and should be completely disregarded. The phrase was injected in § 2a(15) to cover a possible contingency where in fact restraint of a court would be necessary. And actually such situations do occasionally arise, although normally restraint of the parties will suffice.

In the decided cases on the point to date, the courts have been unanimously in accord with this interpretation."

This interpretation was approved in *In re California Pea Products,* 1941, D.C. Cal. 37 F. S. 658, the Court stating at 662:

"It would have been a simple matter for Congress to have made the prohibition against the referee's power to issue injunctions general if such had been the legislative intent. As no such intent appears but, on the contrary, only a specific prohibition being shown, the referee is in all other instances vested with plenary judicial power to issue stay orders when acting under a general reference."

In a situation where a bankruptcy referee made an order directing a creditor to refrain from making any claim against a fund deposited before bankruptcy, by the bankrupt, with a State Court, on the ground that the fund belonged to the trustee, it was held in *Aldrich Shoe Co. v. Kagan,* 1949 (1 Cir.) 173 F.2d 457, at page 460:

"Consequently the order appealed from then becomes justifiable under the general bankruptcy powers, including that to grant an injunction to

prevent interference with the enforcement of the Act. Bankruptcy Act, Sec. 2, sub. a (15), 11 U.S.C.A., Sec. 11, sub. a(15); * * *"

The foregoing decision followed the ruling of this Court in *In re Sterling,* 1942, (9 Cir.) 125 F.2d 104, where the referee made an order enjoining the drilling of an oil well. When the party enjoined disobeyed the order, a certificate for contempt was filed with the District Court. A motion to dismiss was granted on the ground that the referee had no jurisdiction to issue an injunction restraining the drilling of the oil well. This Court reversed the order of dismissal, and stated beginning at page 106:

"* * * The dismissal was predicated upon a supposed lack of jurisdiction. That courts of bankruptcy have jurisdiction to punish for contempts is clear. It is equally clear that such courts have jurisdiction to grant injunctions, and that ordinarily the violation of such an injunction constitutes a contempt. Conceding all this, appellees contend that the injunction in this case was granted without jurisdiction, and that, therefore, the Court had no jurisdiction to adjudge appellees in contempt for its violation.

"No point is made of the fact that the court, in granting the injunction, acted by its referee and not by the judge. Appellees apparently recognize, as we do, that the referee, in granting the injunction, acted as the court, and was the court. Appellees' contention is that the court itself—a district court of the United States sitting as a Court of Bankruptcy—had no jurisdiction to grant the injunction.

"The question of the court's jurisdiction to grant the injunction was raised by Bolsa Chica at the first hearing before the referee and was determined adversely to Bolsa Chica's contention by the referee's order of May 15, 1940. No review of the referee's order was sought or obtained. The time within which such review might have been sought expired long before the contempt certificate was filed. As to Bolsa Chica, therefore, the referee's order was and is conclusive; . . ." Citing *Arizona Power Corporation v. Smith,* 1941 (9 Cir.) 119 F.2d 888, 890.

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5. **APPELLANTS CONSIDERED THE BANKRUPT THE REAL PARTY IN INTEREST IN THIS PROCEEDING AND IN THE STATE COURT ACTION.**

The theory upon which the case was tried by both Appellants and Appellee was that the bankrupt was the true owner of the contract and the real party in interest.

The entire transcript of testimony at the proceedings concerns itself with performance, breach, and damages. Not once in the more than four hundred pages of testimony was the ownership of bankrupts questioned.

After urging upon the Court below that this same issue was before a State Court and that "full and absolute relief can be granted the parties in said Superior Court Action in Humboldt County" (Affidavit of Appellants' Counsel T. 36) and after introducing State Court pleadings for the proof of that *specific*

point—after urging the defense of comity, which presupposes common identity of parties and issues in two proceedings, and introducing the only *evidence* indicating a possible assignment in support of the comity defense—the Appellants now take the inconsistent position that the parties in interest are not the same, and that the pleadings introduced were brought in to demonstrate that proposition.

The record brought forward at the request of Appellants provides us only the affidavit of their counsel as to their contention at the time of lower Court action. The determination by the trial Court on the issue of the real party in interest was in accord with that position. It is unseemly in our law to invite action and then complain of it.

On the basis, then, that the theory of the case at trial conceded bankrupt was the real party in interest, Appellants should not now be heard to complain that it was not the proper theory.

5a. **THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FINDING OF THE REFEREE, AFFIRMED BY THE DISTRICT COURT, THAT THE TRUSTEE OWNED THE RIGHTS UNDER THE CONTRACT.**

Disregarding the ensaddlement of different mounts by the Appellants in their efforts to bring home a winner, there still remains in the record before us evidentiary basis supporting the determination that the bankrupt owned the rights under the contract.

In determining the ownership of a cause of action and in identifying the real party in interest, the Federal Court will apply the law of the state in which it sits. *American Fidelity and Casualty Co., Inc. v. All American Bus Lines,* 1949, 10 Cir., 179 F. (2d) 7; *Young v. Garrett,* 1945, 8 Cir., 149 F. (2d) 223; *Erie v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487. The same rule applies in determining who has burden of proof. *New York Life Ins. v. Rogers,* 126 F. (2d) 784, 1942, 9 Cir.; *Department of Water & Power v. Andersen,* 1938, 9 Cir., 95 F. (2d) 577.

California decisions as to ownership and real party in interest hold pleadings are not evidence to prove the truth of the facts therein contained. *Garfield v. Knight's Ferry,* 14 Cal. 35; *Goodwin v. Hammond,* 13 Cal. 168; *Bostic v. Love,* 16 Cal. 69; *Gajanich v. Gregory,* 116 C.A. 622; *Campbell v. Rice,* 22 C.A. 734.

> "That the Answer is not evidence for the defendant." *(Goodwin v. Hammond,* supra.)
>
> "It is very true that a pleading is not proof for the party making it." *(Garfield v. Knight's Ferry,* supra.)

Bostic v. Love, supra, says at the bottom of page 72:

> "The answer is not evidence for the defendant, but only pleading."

In *Campbell v. Rice,* supra, the Court holds that a bill of particulars served upon the defendant in response to his demand therefor is but an amplification of the complaint, its purpose being to apprise the defendant

of the specific demand of his adversary, and it is no more admissible in evidence than a copy of the complaint. In *Gajanich v. Gregory,* supra, the Court states on page 629:

> "The pleading was not admissible in evidence as evidence of the fact so stated." (Citing cases.)

In commenting upon the role of pleadings in a legal action, the Court states in *Casaretto v. DeLucchi,* 76 C.A. 2d 800, on page 806:

> "The function of pleadings is to inform the parties within reasonable limits of the nature of the action pending and the issues involved. It is not to create traps that will require a reversal for non-prejudicial errors."

In further comment on pleadings, the case of *Buxbom v. Smith,* 23 Cal. 2d 535, says as follows on page 543:

> "Moreover the matter of pleading becomes unimportant when a case is fairly tried upon the merits and under circumstances which indicate that nothing in the pleading misled the unsuccessful litigant to his injury. (citing cases) Consistent with these liberal principles is the mandate of Section 4½ of Article VI of the State Constitution 'No judgment shall be set aside . . . for any error as to any matter of pleading . . . unless after an examination of the entire cause including the evidence the Court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' "

A pleader is bound only as to issuable facts. 39 *Cal. Jur.* 2d on Pleading, Section 14, page 22. He is not

bound by irrelevant facts or evidentiary facts which may be pleaded.

In this proceeding, the point here at issue is the ownership of the contract rights. The manner of acquisition of ownership is not in issue—the ultimate fact to be determined, and as to which the issue concerns itself, is ownership, nothing more and nothing less.

In pleading ownership, the pleader is required only to state the fact of ownership and not the deraignment of title, and in an instance where such deraignment of title is alleged, it is surplusage and irrelevant material, 39 *Cal. Jur.* 2d on Pleading, Section 21, page 32. It is both unnecessary and improper to plead such evidentiary matter.

In *Larco v. Casaneuava,* 30 Cal. 560, the Court says on page 565:

> "It is therefore either immaterial matter which encumbers the record and which the defendants if so inclined have a right to have removed; or it is a matter of evidence which ought not to be inserted in a pleading under our system even where it consists of a deraignment of title in an action of ejectment."

In *McCaughey v. Schuette,* 177 Cal. 223, the Court holds that the only proper pleading is ultimate facts and not evidentiary or probative facts which would tend to prove the ultimate issue of ownership.

In the case of *Harris and Jacoby v. Hillegass,* 54 Cal. 463, the Court comments on evidentiary matter concerning the ultimate fact or issue on page 470 as follows:

> "Even where such statements if admitted to be true would establish prima facie an ultimate or pleadable fact, they cannot be substituted in a complaint or answer for an allegation of the fact to be put in issue."

Admissions in a complaint do not defeat a cause of action where they are probative rather than ultimate facts. 39 *Cal. Jur.* 2d on pleading, Section 21, Page 34.

Thus, it is obvious that, under applicable State decisions, neither Court nor parties are bound by the pleadings in a particular case nor are facts *established* merely by pleading. There is no requirement that the Court accept pleadings as determinative of an issue, particularly where the facts alleged are unnecessary surplusage.

In its effort to adjudicate controversies on the basis of the *real* facts and the *full* facts, the Federal Court has adopted Rule 15 (b) Federal Rules of Civil Procedure, allowing the Court to find the facts as they exist, whether pleaded or not. *(In re Germain,* 144 F. Supp. 678, at 683.)

Since pleadings in this proceeding are not evidence, the only *evidence* establishing the existence of an assignment by the bankrupt consists of an allegation contained in a pleading in another action, made by the purported assignee. (Claimant's 1.) Appellants must accept the theory that the assignee corporation is the same entity as the bankrupt; otherwise the allegation contained in its State Court pleading would not bind the bankrupt as an admission!

Even were the allegation of the State Court pleading considered as an admission of the bankrupt, it would not *compel* a finding in accordance therewith. *Nelson Bros. Coal Co. v. Perryman-Burns Coal Co.* 1931, 2 Cir., 48 F. 2d 99. In that case the Court observes at page 101:

> "We think the statements by Perryman-Burns Coal Company Inc. which were made in the former litigation were no more than matters of opinion, . . ."

While such evidence might be sufficient to support a finding in accordance therewith, it certainly does not compel such a finding. In the face of other evidence to the contrary, it would, at most, but serve to create a conflict.

As Judge Halbert pointed out in his Order (T. 74), there is nothing before this Court by way of transcript of the proceedings wherein the defense of *jus tertii* raised by Appellants in their motion to withdraw the claim and plea in abatement was disposed of by the Referee adversely to Appellants. It may have been on procedural grounds (FRCP 25 (c), 12 (h), or 19 (b)) and/or substantive (corporate assignee not sufficiently separated from bankrupt—see affidavit of Appellants' Counsel (T. 36)—"That it affirmatively appears from the pleadings on file in said action (brought by corporate assignee and to which bankrupt was not a party) and from the documents on file herein that full and absolute relief can be granted the parties in said Superior Court action in Humboldt County"—wherein Appellants apparently recognize no distinction between the corporation and the bank-

rupt.) *(In re Gillespie Tire Co.* 1942, 54 F. Supp. 336.) In any event, the burden is upon the Appellants to point out *specifically* the error of the Court below and the *recorded facts* demonstrating the error. *(Humphreys Gold Corp. v. Lewis* 1937, 9 Cir. 90 F. 2d 896.) Without having brought forward the record surrounding the ruling, how can Appellants successfully attack or criticize it?

This Court has repeatedly held that where a record is not brought up, the findings of fact and conclusions of law of the trial court must be presumed to be correct. *Rickard v. Thompson,* 1934, 9 Cir., 72 F. 2d 807, 809; *Bakersfield Abstract Co. v. Buckley,* 1938, 9 Cir., 100 F. 2d 530, 532. This rule was followed in *In re Hurt,* 1955, D.C. Cal., 129 F. Supp. 94, 97.

However, on the merits, there is evidence sufficient to establish a *prima facie* ownership of the cause of action in the bankrupt.

Appellee showed that the instrument (Trustee's 1) was executed by Appellant Peters and bankrupt, naming bankrupt obligee as to its rights in the contract. (T. 89.) The document was in possession of bankrupt from which a presumption of delivery follows. The contract was introduced into evidence. (T. 90—Trustee's 1.) The contract itself expressly provided that it was not assignable. (T. 9, Sec. 12.) The remainder of the record shows on almost every page performance by bankrupt, accepted by Appellants, and payment by Appellants to bankrupt of monies due under the contract. (Trustee's 6 through 12—T. 172 et seq.) Nowhere in the *evidence* (save for the alle-

gations of the purported assignee in other litigation) is there any suggestion of assignment by the bankrupt.

California adopts the presumption of continuation stated as follows at § 1963, sub. 32, *C. C. P.*:

> "That a thing once proved to exist continues as long as is usual with things of that nature."

That presumption has been extended to include title to real property and under State law, to personal property. 18 *Cal. Jur.* 2d on Evidence, Section 84, page 514 and cases there cited. Under that presumption, it would be necessary for the trustee to prove only that the contract was made in the name of, and was therefore prima facie the property of, the bankrupt in order to support a finding of ownership.

That doctrine of pleading and proof of ownership has been adopted in a number of cases in California and represents the law of the State. In *Hook v. White,* 36 Cal. 299, the Court says:

> "The making and delivery of a promissory note by defendant to plaintiff imports a liability to pay in accordance with its terms without any averment of a continuous holding or ownership; and after the allegation of the execution of the promissory note to plaintiff by defendant, a further allegation that plaintiff is still the owner and holder thereof would be surplusage."

In *Monroe v. Fohl,* 72 Cal. 568, the Court says on page 570:

> "The execution and delivery of the note payable to the order of plaintiff being admitted the

> denial that plaintiff was the 'holder' of the note and the assertion that the Bank was the holder without averring any facts showing such to be the case were of conclusions merely and raised no issue."

In *Waldrip v. Black,* 74 Cal. 409, an endorsement naming the plaintiff as owner entitled the Court to presume, there being no evidence to the contrary, that he was the owner of it. In *Cassinella v. Allen,* 168 Cal. 677 the Court states on page 682:

> "The only other point made that is worthy of notice is that the evidence does not support the finding of plaintiff's ownership of the note. The note bearing the endorsement in blank of Whitmore, the payee, was introduced in evidence by the plaintiff. Plaintiff's attorney testified that he had bought the note of Whitemore for plaintiff, paying for the same with money furnished by the plaintiff. This was enough to establish *prima facie,* plaintiff's ownership. . . . (citing cases) . . . The chain of title was not impaired by the fact that the instrument bore another indorsement, concerning which no proof was offered."

In *Shafer v. Willis,* 124 Cal. 36, the Court holds on page 38:

> "It was alleged in the complaint and not denied in the answer that defendants made the note and delivered the same to plaintiff as payee. This note was produced at the trial and offered in evidence by plaintiff without objection. This was sufficient evidence to support the finding of ownership."

Thus it will be seen that under the California law, pleadings other than bare allegation of ownership are

surplusage and should be disregarded, and that proving ownership of a chose in action is sufficient merely by producing the chose in action naming the plaintiff as the obligee thereof and the introduction of the same into evidence. That and nothing more is sufficient to make a prima facie case of ownership.

The only confusing factor in this picture is the pleading of the matter wherein references are made to assignments and invalid assignments, et cetera. However, from the authorities above noted, pleadings are not evidence. The only ultimate factual issue was ownership. All that was required under the California authorities to prove ownership was proved, and until the Appellants came forward with evidence of the existence of the rights of a third party there was no further duty on the part of Appellee to proceed with any further proof. At that juncture also the referee had sufficient evidence to support a finding of ownership in favor of Appellee.

The pleading of a defense that the right sued upon belongs to a third party is an affirmative defense and must be pleaded in order to raise the issue. Since it is then the duty and obligation of the Appellants herein to raise the defense and plead the same, it follows that they must assume the burden of proof as to such defense and must affirmatively show that the rights vested in a third person.

The question of ownership of a cause of action on a note and mortgage was raised in a situation where the note and mortgage was assigned to one S. C.

Hastings after which the latter's daughter acquired the note and mortgage by way of a gift. Upon the assignee donor's death an action to enforce the claim was commenced by a testamentary trustee. The defendant maker raised the defense that the action was not brought by the real party in interest and therefore he could not tell to whom to pay the amount found due, nor with safety redeem in event of a sale. In overruling this defense the California Supreme Court, in *Giselman v. Starr,* 1895, 106 Cal. 651, stated at page 658:

> ". . . The cases which seemingly lay down the broad rule that it is not a good plea to allege that the note sued upon is the property of another and not of plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, are to be read in the light of their facts, and so read they will be found to be in strict accord with what is here said. These are cases where *prima facie* legal title is shown in plaintiff, such a title as would protect defendant if judgment were obtained upon it. If, under such circumstances, the defendant claims another to be the real owner, he must support his right to make that claim by showing that he has some equity or defense against the real owner which he cannot maintain against the *prima facie* legal owner."

And, in a negligence action, concerning damages to personal property, the California Supreme Court in *Anheuser-Busch, Inc. v. Starley,* 1946, 28 C. 2d 347, stated at page 352:

> ". . . where the plaintiff shows such a title as that a judgment upon it satisfied by defendant will protect him from further annoyance or loss, and where, as against the party suing, defendant can urge any defenses he could make against the real owner, then there is an end of the defendant's concern and with it of his right to object; for, so far as he is interested, the action is being prosecuted in the name of the real party in interest. . . . As we have seen, such protection is afforded in the case at bar."

An objection that a plaintiff is not prosecuting an action in good faith or is not the real party in interest should be determined by *proof on the trial* and *not upon the pleadings or affidavits.* 39 Am. Jur. on Parties, Section 108, page 981.

When Appellees introduced the agreement (T. 90), executed by Appellants as obligor, and Snow Camp Logging Company as obligee, a prima facie case of ownership was established in favor of the bankrupt, Snow Camp Logging Company, sufficient to support a judgment. The assertion of lack of ownership as a defense asserted by Appellants must be proved. This they have failed to do. The State Court pleadings introduced in evidence—that being the only evidence in Appellants' favor on this issue—at most raised a conflict. The resolution of this conflict was a matter for the trial court.

Therefore, on the basis of the theory followed at trial by Appellants, and the evidence adduced, the Court below did not err in its finding that ownership of the contract was in bankrupt.

6. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO ANTICIPATORY BREACH OF THE CONTRACT BY THE BANKRUPT.

Appellants contend that the bankrupt repudiated its contract obligation to Appellants by agreeing to supply logs to other mills.

Section 3 of the contract involved (T. 7), obligated bankrupt to supply the logs required by the buyer. The only prohibition against sale of logs to others is found in Section 8 (T. 8) which provides: "Seller shall have the right to sell logs of any type to other buyers of logs until buyer comes into full production on that type of log. In the event Buyer ceases production upon any type of log, or cuts back on production, Seller shall have the right to sell any of such logs as Buyer does not require, upon the open market and to other Buyers."

This provision obviously calls for a number of definitions as to what constitutes full production; how is the Seller to be notified of full production; what the contemplation of the parties was as to full production; and the nature and scope of the contract as to the timber area and operations to which it applied. These are all fact questions to be determined by the trial court.

At the outset of the contract, full production was estimated at between five and six million board feet a month. (T. 95.) Actual production achieved during the entire period of 1953 was approximately 2,200,000 feet per month. (Trustee's 14.) Appellants operated through a portion of the summer and particularly in

July and August, at three shifts per day, but prior to the first of September, 1953, cut back to two shifts. (T. 409-410.) During the first half of September, the mill was not operating at full production. (T. 410.) During all that time Appellant's pond was full of logs. (T. 406.) After cutting back from three shift operation in August, full production was never resumed. (T. 406.) On September 12, 1953, under this fact situation the Appellants claimed to be in full production. (Claimants' Exhibit No. 4.) Appellants made no other demand upon the bankrupt in this connection either before or after.

Gang logs were defined in the contract as being any log 32 inches or less in diameter. (T. 8, Section 5.) Accordingly any log larger than 32 inches was exempt from the coverage of the contract.

The contract contemplated the operations of both parties in the Redwood Creek area only, (T. 6, T. 9, Section 13, T. 10, Section 17) *and accordingly obligated log production of the Sellers in that area only.*

Bankrupt maintained logging operations in the Blue Lake area and in the Snow Camp area. (T. 374.)

Under those provisions of the contract then, clearly bankrupt was entitled to sell all of its production from the Blue Lake area and Snow Camp area to whomsoever it chose and to sell all logs above 32 inches in diameter at all times to anyone whomsoever it chose, and as to logs produced in the Redwood Creek area only, which were 32 inches in diameter or less, it could sell to any mill at any time that Appellants were not in full production.

For any contract with another mill calling for sales of logs to such other mill to become material to the issues of this case, it would have to appear affirmatively from the contract itself and from the foundation laid, that it must of necessity be supplied out of *logs 32 inches or less in diameter produced in the Redwood Creek area and at a time when Appellants were in full production.*

It would also appear to be a matter of common sense that the Appellants would not be entitled to complain of a violation of the restrictive sales section of the agreement (Section 8) until notification of full production had been given to bankrupt and demand made for compliance therewith. This was not done until September 12, 1953, at a time when the mill was admittedly barely in operation and under a severe curtailment of production. There is no evidence in the record of when, if at all, "full production" was regained after the September shutdown. Significant, however, is that the claim of full production in Appellants' No. 4 came at a time when its production was at its lowest ebb.

Error is assigned by the Appellants in this connection specifically as it relates itself to rejection of an offer of proof set out in Appendix A, AOB.

Primarily it must be kept in mind that the lack of relevancy and materiality of the contract offered was questioned on the basis of the showing made at the time of the offer (T. 373), and that the objection to its reception in evidence was limited to the showing made at that time. The Referee observes on page 373,

"I cannot see the relevancy of the question at this time. Later on in the proceedings, you may show it, but at this time the objection is sustained so far as the other contract is concerned."

The foundation for the admission of the Western Studs contract at the time of its offer consisted simply of the fact that Appellants had sometimes been in full production, sometimes not. (T. 365.) The contractual definition of a gang log was entirely overlooked in any foundational examination of the witnesses. It consisted of the gratuitous statement that "gang logs can also be called stud logs". (T. 366.) The bankrupt was logging not only in the Redwood Creek area but the Snow Camp area and the Blue Lake area. (T. 374.) The Snow Camp area and the Blue Lake Creek areas were not covered in the contract at issue. There was no evidence of the production being achieved from the Snow Camp area and the Blue Lake Creek area as being adequate or inadequate to supply the proffered Western Studs requirements. There was no evidence that Western Studs purchased the type of log defined as a "gang log" in the contract. On the basis of the foundation in evidence at the time of the offer of the proof, it was properly denied as irrelevant and immaterial.

Subsequent to the offer of proof, it developed that more than eleven million feet came off of the Snow Camp show in 1951 alone; in 1953, fifteen million feet came off production other than the Redwood Creek Ranch. (T. 386.) Thus it can be seen that the volume of production from areas other than covered by the

contract in issue was sufficient to supply the requirements of the Western Studs contract. It further developed that the requirements at Western Studs were for a sixty-inch log and that they did not like the smaller ones. (T. 400-401.) Thus it can be seen that presumably the Western Studs agreement did not call for logs of the type defined in the contract at issue here as "gang logs".

There is no showing that the alleged Western Studs agreement amounted to a renunciation of the obligations to provide all of Appellants' log requirements. It appears to be abundantly conceded that the Appellants received all the logs they wanted at all times until October 21, 1953, the date of contract termination. Particularly noteworthy in connection with this argument is the testimony of Mr. Peters (T. 432):

> "Q. Now at any time during this operation, Mr. Peters, did you ask Mr. Vander Jack to increase or decrease his logging operation up there?
> A. I tried to get him to decrease it.
> Q. Did you ever ask him to increase it?
> A. Never.
> Q. You say you did ask him to decrease it.
> A. Yes."

Not being able to criticize the volume produced and delivered pursuant to the contract, the Appellants seek to rely upon this extraneous contract with Western Studs as working some sort of renunciation or anticipatory breach. In doing so, Appellants ask the Court to ignore what was actually done by way of adequately supplying Appellants at all times with logs, and to

look instead to a devious theory of renunciation by normal business conduct with other mills whose business was required in order to absorb the entire log production of bankrupt of logs not covered by the contract in issue.

Nowhere is there suggested a renunciation communicated from bankrupt to Appellants. In order to establish an anticipatory breach, some such showing would have had to be made. It is not sufficient for bankrupt to tell Western Studs that it no longer intends to supply logs to Appellants, even if that had been the case. *Restatement of Contracts,* Section 318, Illustration No. 3, *12 Cal. Jur. 2d on Contracts,* Section 245, adopted as the law of the State of California in *Pattie v. Berryman,* 95 C.A. 2d 159 at page 170.

In view then of the facts known to the Court at the time the Western Studs contract was offered, it was properly excluded; and in any event—since it related only to a time of full production by Appellants—its exclusion was not prejudicial inasmuch as the Court after the full hearing of the matter, concluded that the only notice of claimed full production was made September 12, 1953 pursuant to Claimants' No. 4, and that at that time Appellants were not in full production and that the demand made by them on that day was not made in good faith. (Findings of Fact 20. T. 52.) That finding is not attacked upon appeal.

7. ATTEMPT OF APPELLANT TO TESTIFY AS TO CONTENTS OF RECORDS WITHOUT PRODUCING SAME WAS PROPERLY REJECTED.

Appellants, at AOB 30 and 31, raise the point that Appellant Peters was not allowed to testify. Appellant Peters testified that he kept no records of daily production, log deck scales, or log purchases, (T. 169), and after his bookkeepers and accountants had been called to testify as to the information kept by them on behalf of Appellants—the self same records which Appellant said he did not keep—Appellant Peters then sought to testify from a recap of records that he had made. (T. 439-442.) Repeated requests were made for the records to be produced. Subpoenas were served resulting in the statement that no such records were kept (T. 169) and requests were made in Court (T. 441, T. 457) but the same were never produced.

Code of Civil Procedure, Section 1855 of the State of California provides the Court with authority to receive secondary evidence of accounts and other documents, but it does not compel the Court to accept them in instances where as here there is considerable suspicion attached to the manner in which the secondary summaries were compiled.

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8. THE DISTRICT COURT DID NOT ERR IN FINDING THERE WAS NO ACCORD AND SATISFACTION BETWEEN THE BANKRUPT AND THE APPELLANTS.

It is well established that accord and satisfaction is available to an obligor where a sum less than the contract price has been paid in settlement of a *bona fide*

dispute. It is also well settled that the obligor cannot shortchange his obligee in the absence of a bona fide dispute and rely upon retention and cashing of the sum offered as a discharge of his complete obligation.

The law in California is set out very aptly in *Edgar v. Hitch,* 46 Cal. 2d 309. In that case, hay had been purchased and sold at $42.50 a ton and it later appeared that a dispute may have arisen regarding the rain damage of some of the hay with a final settlement price of $32.50 per ton being paid by the buyer for that portion and accepted in cash, under protest, by Seller. The trial court found against the defendant Buyer with the defense of accord and satisfaction being interposed. The California Supreme Court reversed the trial court and remanded the case for a definite finding on the existence of a good faith dispute.

In the case before us the trial court has expressly found that there was no good faith dispute. (Finding of Fact No. 10, T. 50.) Therefore the scope of the inquiry here would be limited to whether or not there was any substantial evidence to support such a finding.

Appellants have set out in Appendix D the testimony of Appellant Peters in this connection, and from which it can be gleaned that (1) Peters claimed the reduction was by some sort of an agreement; (2) he did not know what the agreement was; (3) he was willing to take at least three guesses at it before the examination was terminated by the counsel for the Appellee. Nowhere in his testimony did he suggest a

dispute as to the proper method of computing the price according to the contract in issue here. As an addition to the record in this respect set out in Appendix D, AOB, we would add the following from transcript. (T. 402-403):

"Q. You had been delivering logs to Timber Incorporated and Peters Mill for sometime prior to this period, had you not?

A. I had.

Q. And all those deliveries were under this contract that is in evidence?

A. That is right.

Q. Had, during that time, any procedure been used consistently for the determination of the Arcata market price?

A. Well, we sold to as many as six or seven mills other than Peters in that area and they were the major mills there, probably constituted 75% to 90% of the mills. That was a fair standard for the market, I am sure, and that was always acceptable to Mr. Peters.

Q. And that procedure had been used during the entire performance of the contract?

A. That is correct.

Q. The same procedure establishing the market per the invoices you submitted?

A. That is right.

Q. There was no objection ever conveyed to you that this was not the proper method to use?

A. No, there never was.

Q. To compute the price under the contract?

A. No.

Q. In other words, there was no dispute about that?

A. No dispute about it at all."

The last cited testimony alone would be sufficient for the trial court to conclude that there was no good faith dispute and sufficient evidence to support the Court's finding that there was none.

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9. THE DISTRICT COURT DID NOT ERR IN FINDING THE DAMAGES AWARDED ARE FULLY SUPPORTED BY THE EVIDENCE.

Four elements of damage appear in the findings of fact in this case, as set out in the Appellants' Opening Brief, page 35. We concur wholeheartedly in the suggestion made that the burden of proof as to these damages rested with the Appellee. We contend that the Appellee sustained that burden of proof and the Referee having made his finding in that connection based upon substantial evidence, and the District Court having affirmed, we submit that it is now a fact question into which this Court will not inquire.

The amounts awarded in the first two elements of damage, to wit: the underpayment by the Appellants to the bankrupt for logs delivered in the sum of $19,625.91 is not questioned by Appellants insofar as the amount is concerned. The Appellants also state their capacity to comprehend the manner in which the $30,931.57 loss of truck earnings is computed. (AOB 35.)

Therefore, the only matters with which we need concern ourselves at this juncture is the $146,319.00 awarded for disruption of normal operating procedures and the $477,750.99 awarded for loss of sales

price advantage of future performance called for by the contract.

The item awarded for truck earnings as set out in AOB 36 concerns itself only with the loss of use of trucking equipment of substantial value: there were 5 International trucks at $17,000 per unit, and 12 GMC trucks at $20,000 per unit. (T. 98.) This was based primarily upon Trustee's Exhibit No. 18 which applied only to truck earnings for average trucks in the area at the time, based upon their actual earnings. It did not in any manner take into account the man hours required to operate the trucks. Those were reserved for the third element of damage set forth, to wit: the disruption of normal operating procedures. There is no need to be deceived here just as the trial court and the District Court were not deceived by an attempt to confuse this element of damage relating to loss of use of equipment with the loss of man hours.

The loss of man hours relates itself to the loss of the wages paid to the truck driver plus the wages paid to the logging crews who cut the timber, prepared it for loading and loaded it upon the trucks. Those man hour losses are set out in the computation of the third element of damage—disruption of normal operating procedures.

Trustee's Exhibits Nos. 14-18, considered in connection with the testimony contained in the record, (T. 297-321) and the reference to the cost per hour to maintain a crew in the woods per hour for the man hours alone as shown by the record (T. 114-120), constitutes adequate substantial evidence from which the

Courts below could and did ascertain damages to exist as found.

The Appellants would seek to capitalize upon an apparent error in one of the Exhibits in evidence wherein January 1st, 1953 through September 31, 1953 is stated to be an eight-month period. Upon the face of it, that is a mistake. We must not, however, necessarily conclude that it was upon the basis of that evidence solely that damages were computed. It would appear from the record that the figures contained in the Trustee's Exhibit 15 may have been adopted by the Court below in computing damages. There is no compulsion to that view, however, inasmuch as testimony has previously been referred to showing amounts of logs delivered which are not in complete agreement with that Exhibit.

Even should it be conceded, however, that the fourth element of damages, to wit: the loss of sale price advantage on future performance is erroneously computed based upon an error in one of the exhibits, it would but amount to an adjustment of approximately $53,000 in the judgment.

The remainder of the Appellants' discussion of damages can be dismissed as but wishful thinking. It adds up merely to an attempt to limit damages for future performance to the inventory upon the merchant's shelf at the date of breach. It does not take into account future acquisitions of inventory and would lead to the absurd result that a seller, in order to obtain compensation for breached contracts calling for long-term deliveries must at all times during those

contract performances be required to maintain an inventory sufficient to supply a ten-year demand. Such a theory hardly deserves serious consideration.

In AOB 40 and 41 the ridiculous suggestion is made that since other mills were being supplied with logs by the bankrupt that therefore any award of damages for future deliveries would necessarily include a duplicate payment for them. As has been observed, the bankrupt had production over and above and aside from that covered under this contract sufficient to supply adequately all other commitments. After repudiation of the contract by Appellants, bankrupt was required to deliver all its production to other mills. (T. 297.) The record shows without dispute (T. 300-302) that it cost $10.31 per thousand to deliver logs to any available market other than Appellants' mill, and $4.00 per thousand to Appellants' mill. This differential of $6.31 per thousand resulted from additional distances to available markets. The bankrupt under the contract (T. 7, Section 4) was required to surrender only $4.00 per thousand of the $6.31 delivery price advantage to Appellants. The damages awarded were as claimed and computed upon the basis of the loss of $2.31 per thousand price advantage. This is the proper measure of damages. (Calif. Civil Code, Sec. 3353.) This rate per thousand, multiplied by the fair and reasonable estimate of volume which should have been accepted by Appellants during the unexpired life of the contract produces the sum of $477,750.99 as to this element of damage.

It is also interesting to note that mathematical errors alleged to have occurred in the computation of damages have not been urged nor presented to the Referee nor to the District Court heretofore, but are raised for the first time upon appeal to this Court. If the errors were as patent as Appellants would seek to lead us to believe, they would have been discovered ere now.

In presenting to this Court references to the transcript and to the Trustee's exhibits in evidence Appellee has shown that the Referee and the District Court had adequate support in awarding damages in the amount of $674,627.47.

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10. THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED FOR THE REASON THAT IT PROPERLY AFFIRMED AND ADOPTED THE ORDER OF THE TRIAL COURT.

It is said in *In re Penfield Distilling Co.*, 1942, 6 Cir., 131 F. 2d 694 at 695:

> "Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on appeal, on anything less than a demonstration of plain mistake."

Rule 52 (a) of the Federal Rules of Civil Procedure (28 U.S.C.A. following sec. 723c), provides:

> "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

The referee as trier of the facts made a specific finding (T. 53, No. 25) that he did not believe the testimony of appellants nor that of the witnesses presented in their behalf. The record amply supports such finding. This Court approved the findings of a referee which had been reversed by the judge of the District Court in the case of *Acme Distributing Company v. Collins,* 1957 (9 Cir.), 247 F. 2d 607, and stated at page 613:

> "In Ott v. Thurston, 9 Cir., 1935, 76 F. 2d 368, 369, the late Judge Garrecht said:
>
> 'Another error stressed by appellant is that the judge of the District Court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the District Court stated in its opinion: The evidence was at least conflicting, the District Court is not at liberty to disregard the Referee's finding (sic) for they had sufficient support in the evidence.' *The court was here expressing the general rule of practice on review on appeal.*
>
> "'It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions of questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the Court.' (Cases cited.)" (Emphasis supplied.)
>
> "In the instant case, we are unable to understand how 'the sense of justice of the learned

> Chancellor was offended by the careful and well-documented findings of the Referee.' ''

In *Hudson v. Wylie,* 1957, 9 Cir., 242 F. 2d 435, this Court reviewed numerous decisions of this and other Circuits covering a variety of situations with respect to petitions for review and the assailability of a referee's findings, and quoted from *Ott v. Thurston* (supra), stating at page 451:

> ''* * * And the findings of a Chancellor, based on testimony in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' Neece v. Higgins, 9 Cir., 72 F. 2d 791, 796; Exchange Nat. Bank (of Spokane) v. Meikle, 9 Cir., 61 F. 2d 176, 179.''

To the same effect are the holdings of the Court in the following cases:

Lines v. Falstaff, 1956, 9 Cir., 233 F. 2d 927, 930;

Earhart v. Callan, 1955, 9 Cir., 221 F. 2d 160, 164 (Certiorari denied, 1955, 350 U.S. 829, 76 S. Ct. 59);

In re Magnet Oil Co., 9 Cir., 119 F. 2d 260, 261-262.

On the same subject this Court in *Heath v. Helmick,* 1949, 9 Cir., 173 F. 2d 157, stated at page 162:

> ''* * * In any event, this court would be constrained to support the findings of a referee who saw the witnesses, where these are fully supported by the record and are concurred in by the trial court on review.'' (Citing Kimm v. Cox, 8 Cir.,

130 F. 2d 721; Goldstein v. Polakoff, 9 Cir., 135 F. 2d 45.)"

And in *Goldstein v. Polakoff* (supra), where the Court stated at page 45:

"Recitation of the evidence follows in the brief and we have given it close attention. There is, however, nothing before us but a request that we try the case de novo on the record. It is true that appellant states in each of his 'Specifications of Errors' as to the court's findings that 'the finding * * * is against the weight of and not supported by the substantial evidence.' But in each instance the issue turns upon the trial court's conclusion from substantial documentary evidence together with highly conflicting testimony of witnesses relating thereto.

Suffice it to say that, applying Rule 52, Federal Rules of Civil Procedure, 28 U.S.C.A., following Section 723c, in giving '* * * due regard * * * to the opportunity of the trial court to judge of the credibility of the witnesses.' We do not find the trial court's findings of fact 'clearly erroneous.'"

Similarly in *Wittmayer v. United States,* 1941, 9 Cir., 118 F. 2d 808, this Court stated at page 811:

"As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S. Ct. 169, 170, 61 L. Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses' 'depends upon conflicting testimony or upon the credibility

of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' ''

The Appellee therefore respectfully submits that the order of the District Court, confirming the order of the Referee, should be affirmed.

Dated, San Francisco, California,
July 30, 1959.

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